

JUSTICE BASE



Behind Closed Doors: Obstacles and Opportunities for Public Access to Myanmar's Courts

JUSTICE BASE

Justice Base promotes the rule of law in transitional and post-conflict societies by building the capacity of local lawyers and supporting nationally owned rule of law initiatives. We endeavour to strengthen the capacity of lawyers to engage in – and guide – the national discussion on rule of law needs and priorities, develop domestic rule of law initiatives, and lead legal and institutional reform efforts in emerging democracies.

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Behind Closed Doors: Obstacles and Opportunities for Public Access to Myanmar's Courts

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COVER PHOTO: Entrance to Kyauktada Township Court, Yangon. May 25, 2017
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EXECUTIVE SUMMARY

The National League for Democracy's (NLD) victory in national elections in 2015 is said to have marked the dawn of "a new era" for democracy in Myanmar.¹ The NLD has emphasized the importance of establishing the rule of law as part of this transition. However, the judicial system is afflicted by a number of serious problems, of which the best documented are widespread judicial corruption, the executive branch's improper influence over judicial functions and the low competency levels of judges and lawyers. As a result of these sorts of problems, public trust in Myanmar's formal justice system is low.

Another significant problem has been the exclusion of the public from Myanmar's courts. Previous regimes frequently tried suspected offenders out of public view in closed door hearings before civilian courts and martial law tribunals.² While the right to a public hearing is enshrined in the Constitution of the Republic of the Union of Myanmar (2008) ("the 2008 Constitution"), there has been little recent analysis about whether this entitlement exists in practice.

This report aims to provide a snapshot, as of mid-2016, of the extent to which the public is able to access and observe proceedings in Yangon Region's courts, including Township Courts, District Courts and the Yangon High Court. The findings presented below are based primarily on the research of four Myanmar nationals recruited by Justice Base to spend a month each observing, and attempting to observe, hearings in Yangon's courts. Justice Base also conducted several interviews with Myanmar lawyers and employees of legal non-governmental organisations to elicit their views as to the state of public access to court proceedings in Yangon and the perceived importance of such access.

This report is divided into three parts. Part I provides a brief overview of Myanmar's judicial system and some of its well-documented problems. Part II considers the right to public hearings, including the right's conceptual justification, its standing in international and domestic law, and its relevance in contemporary Myanmar. Part III then presents data and conclusions from Justice Base's program of observation.

The right to a public hearing serves the interests of a defendant or the parties to a proceeding by promoting accountability and scrutiny of all actors involved in court processes. The right also serves the interests of the public at large, encouraging public understanding of the judicial system and helping to establish its legitimacy.

The right to a public hearing is not absolute. International rights instruments recognise that, in some contexts, the right may be outweighed by the right to privacy or other concerns.

While Myanmar law provides for the right to a public hearing, observations conducted by Justice Base reveal there are, in practice, substantial barriers to public access to both court premises and individual courtrooms in Yangon. Justice Base's four observers spent one month observing 205 criminal and civil hearings in 119 courtrooms across 36 of Yangon's 50 courts. During this time:

- (i) Observers encountered obstacles to entry of courthouse premises at six of the 36 courthouses visited, or around 16%.³ At numerous courthouses,

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observers' entry was contingent upon the provision of their identifying details (such as name, identification card, and address). At the gate of two separate courthouses, observers had to meet with the Chief Judge to justify why they ought to be granted permission to enter. At a few different courthouses, observers were refused entry on the basis that they had no personal connection to a particular hearing.

- (ii) Observers faced some sort of challenge, intimidation, or barrier to entry in over half of the courtrooms they attempted to enter. In numerous courtrooms, observers were permitted to enter only after providing various identifying details, seeking permission from the judge, or justifying their presence in the face of a challenge from an official or lawyer. At several different courtrooms, observers were refused entry entirely by a police officer or other official. Observers were also unable to enter many courtrooms because those courtrooms lacked both seating for the public and any room in which observers could stand to watch proceedings.
- (iii) In about 50% of the courtrooms they were able to enter without challenge, observers faced some sort of further barrier while inside. Such barriers came from judges, clerks, law officers and lawyers, complainants and police officers. While on most occasions, observers were able to justify their presence and remain in the courtroom, the scrutiny that observers faced was sometimes far more serious and intimidating. On three occasions, judges questioned observers at length after the conclusion of a hearing, including once in chambers. Three times, police officers questioned observers extensively.

In addition to the challenges described above, the physical characteristics of Yangon's courts are not readily conducive to public hearings. Observers estimated the typical courtroom in a Township Court measured 4.6 by 4.6 metres. Seating for the public was only available in one-third of courtrooms. Observers rarely recorded that members of the public were present in courtrooms. Indeed, the public was twice as likely to be waiting outside in the corridor. Facilities such as bathrooms were almost never available to the public, and up-to-date cause lists advertising hearing times and rooms were present for only around 60% of courtrooms.

Myanmar law permits a judge to exclude members of the public from attending court proceedings in certain circumstances. However, in most cases, it was officials other than judges involved in excluding observers from court. Moreover, judges (and other officials) failed to provide the legal basis (e.g., any reference to Myanmar law) on which observers were refused entry to courthouse premises and courtrooms. And judges, police officers, clerks and lawyers frequently acted as if only those with a personal connection to the hearings could or ought to be allowed to observe proceedings.

Increasing public access to the courts is not alone sufficient to fix Myanmar's judicial system. Doing so is, however, a necessary condition for restoring public trust in the courts. The problem is therefore one that ought to be tackled alongside other issues, such as judicial corruption, to meaningfully reform the judicial system.

KEY RECOMMENDATIONS

To address the concerns described above, Justice Base highlights the following key recommendations:

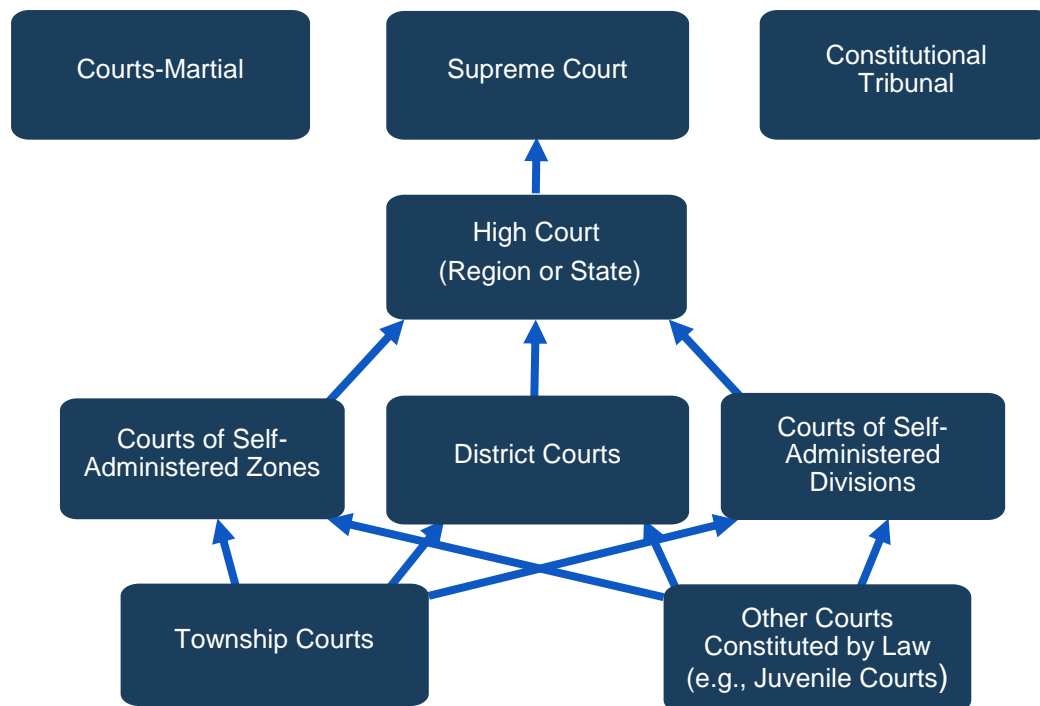
- (i) Judges should, in accordance with Section 19(b) of the 2008 Constitution and Section 3(b) of the Union Judiciary Law 2010, administer courts on the basis that courtrooms, courthouse buildings and court premises are open to the public. The right to a public hearing and access to either a courtroom or the courthouse generally should only be restricted in exceptional circumstances, such as when it is strictly necessary to protect the interests of justice or when a security threat exists. Judges should explain their reasons for restricting the right to a public hearing in open court and explain which provision of Myanmar law they are relying on to exclude the public.
- (ii) Judges and other court officials should discontinue the practices of acting as if members of the public can only (or should only) observe a hearing if they have a personal connection to a particular hearing and requiring permission of a judge to enter a courtroom. Judges and other court officials should refrain from requiring members of the public to provide identification cards or other identifying information before entering a courthouse or courtroom or at least strictly limit such practices. Courts should also remove any signs suggesting that such permission is required.
- (iii) Court officials should take steps to improve public access to courtrooms, including by taking measures such as providing seating whenever courtroom space permits, making bathrooms and other facilities freely available to the public, and ensuring that up-to-date and accurate cause lists are made publicly available in courthouses. Leaflets, posters and simple illustrations depicting the public's right to court access should be readily available at information counters inside each courthouse. Court officials should also prioritise the use of bigger courtrooms where possible and, if and when new courthouses are constructed, ensure courtrooms have adequate space and seating for the public.

THE JUDICIAL SYSTEM IN MYANMAR

I. MYANMAR'S COURT STRUCTURE

The 2008 Constitution establishes a number of courts.⁴ At the lowest level are the Township Courts, which have original jurisdiction in both civil and criminal cases.⁵ The District Courts have original jurisdiction in some matters, as well as jurisdiction to hear certain appeals from Township Courts.⁶ Township and District Courts are supervised by High Courts, of which there is one in each of Myanmar's fourteen Regions and States.⁷ Sitting above the High Courts is the Supreme Court, a court of final appeal that also has some original jurisdiction.⁸ Outside the civilian court system are the Courts-Martial, which adjudicate matters relating to Defence Services personnel,⁹ and a Constitutional Tribunal, which, among other matters, may interpret the 2008 Constitution and adjudicate as to other laws' compliance with it.¹⁰

Diagram 1: The Court Structure¹¹



II. NOTED PROBLEMS CONCERNING MYANMAR'S JUDICIARY

It is well known that Myanmar's judicial system is afflicted by a number of serious problems. The most widely reported of these are considered briefly in turn.

a. Improper executive influence over the judicial function

The 2008 Constitution guarantees the separation of powers and the independence of the judiciary.¹² However, according to the Special Rapporteur on the situation of human rights in Myanmar, these constitutional safeguards are, in practice, "undermined by the control currently exercised by the executive over the judiciary."¹³ The International Commission of Jurists reported last year that:¹⁴

Political and military influence over judges remains a major impediment to lawyers' ability to practice ... effectively. Despite improvements, and depending on the nature of the case, judges render decisions based on orders coming from government and military officials, in particular local and regional authorities.

The period immediately following independence from colonial rule was a high point for judicial independence, during which the courts asserted their concerns with procedural justice and upheld a number of challenges to executive action. However, the military takeover in 1962 “eroded and extinguished the independence of the judiciary in Burma.”¹⁵ The military government abolished the higher courts and replaced them with newly constituted bodies, often staffed with judges who were members of the ruling party. From 1972, politically-appointed lay-judges administered the lower courts and made decisions in the ruling party's interests rather than according to law. The 1974 Constitution “rejected the separation of powers and an independent judiciary in legal thinking, education, and practice.”¹⁶ The State Law and Order Restoration Council continued to tightly control judges after coming to power in 1988. As recently as 2010 it was said that the courts were “more integrated into the army-dominated executive than at any time in their recent history.”¹⁷

b. Judicial Corruption

It is difficult to overstate the “scale and audacity” of corruption in Myanmar's courts, which often function as “marketplace[s] where participants buy and sell case outcomes.”¹⁸ The International Commission of Jurists has reported that corruption is “so deeply embedded into the legal system that it is essentially taken for granted.”¹⁹

The United Nations' Special Rapporteur and the International Bar Association have expressed similar views.²⁰

c. Inadequate training of judges and lawyers

Law schools in Myanmar produce graduates who are generally considered ill-prepared to practice.²¹ Legal education is undermined by, among other factors, low admission standards for law school, corruption, poor curricula and methods of instruction and examination, unqualified instructors, and English-language examination requirements. These problems have their roots in the decline of Myanmar's universities in the second half of the twentieth century, a period that featured frequent enforced closures of universities, close control of curricula, insufficient funding, and a general lack of academic freedom.²²

Similarly, observers consider the training of individuals holding judicial positions to be inadequate.²³ Moreover, the 2008 Constitution does not strictly require judges to have trained or practiced as lawyers.²⁴

The Office of the Supreme Court reported to Justice Base that it is currently working to reform the legal curriculum and improve the training of lawyers and judges.

d. Reforming Myanmar's legal system

The nature of these problems requires more than just reform of substantive legal rules. Something more fundamental is also needed: a rediscovery of judicial actors both holding themselves accountable to laws, including procedural rules, and enforcing laws equally and independently.²⁵

The issue of public access to court proceedings goes to the same fundamental issue. When legal results can be bought and sold, are dictated by the government, or are reached ineptly, the public lose faith in the judiciary and the concept of law itself.²⁶ The same is true if judges and other justice officials treat courts as a place in which the public has no right to be. Respect for procedural rights, including the right to a public hearing, is crucial to fostering the populace's acceptance of law and belief in its legitimacy.²⁷ So while upholding the right is not a sufficient condition to restoring the legitimacy of a malfunctioning legal system, it is a necessary one.

THE RIGHT TO A PUBLIC HEARING

I. WHY ARE PUBLIC HEARINGS IMPORTANT?

The right to a public hearing is “both [] a safeguard for the parties to a dispute, and . . . in the interest of the democratic polity at large.”²⁸ Regarding the interests of the parties (or, in the context of a criminal trial, the accused), the public conduct of a hearing and the public delivery of a judgment enable public scrutiny of all actors involved in the court process, promoting accountability and the fairness of the trial and its outcome. Such scrutiny may, for instance, discourage judges from reaching capricious or unfair decisions and discourage perjury on the part of parties and witnesses.²⁹ In this sense, the right to a public hearing is an aspect of the broader right to a fair trial.³⁰

Regarding the interest of the public more generally, public hearings serve an important educational function. When courts are closed, the public may not understand how the courts work and is unable to assess the strengths and weaknesses of the justice system. Public hearings, by contrast, encourage such understanding.³¹ They also educate the public on substantive rules of law, as was pointed out by one Myanmar lawyer interviewed during this project.

In addition, public hearings fulfill the important function of legitimating the legal system and, by extension, government more generally. Open courts help develop and maintain public trust in the court system and the administration of justice. By contrast, when the public is excluded from courts, the courts are stripped of their legitimacy. A popular sentiment in the context of recent debates about secret terror trials in the United Kingdom was that “justice conducted behind closed doors . . . is no kind of justice at all.”³² It is fundamental to the rule of law³³ and democracy itself³⁴ that trials are fair and conducted in public.

Because the right serves the interests of both parties to a case and the wider public, this report will refer interchangeably to the right to a public hearing and the right to observe court proceedings. The right to observe court proceedings facilitates independent trial monitoring programs, which can themselves support the right to a public trial, build confidence in the judicial process, and, through the presence of monitors, lead the judiciary to implement improved procedures reflective of fair trial standards. Trial monitoring is important in the Myanmar context because it can help identify areas for reform, enhance the capacity of judges and other stakeholders through trial monitoring reports that address weaknesses and offer solutions, and encourage public access to the courts. Such programs cannot occur if courts are closed.

II. THE RIGHT TO A PUBLIC HEARING UNDER DOMESTIC LAW

The right to a public hearing in Myanmar is not absolute and the law permits judges to exclude the public from courts under certain circumstances. Section 19(b) of the 2008 Constitution prescribes that justice is to be dispensed “in open Court unless otherwise prohibited by law.” The same is stated in Section 3(b) of the Union Judiciary Law 2010. In particular, Myanmar law contains general discretionary powers to exclude the public from court proceedings as well as specific restrictions dealing with certain types of cases.

Section 352 of the Code of Criminal Procedure 1898 provides:

The place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them: [provided] that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

The Courts Manual confers a similar discretion upon judges to close the courts with the rationale of ensuring the courts' security. Section 48(1) reaffirms presiding judges' "discretionary power" under the Code of Criminal Procedure to "exclude the public generally, or any particular person, from the room or building used by him as a Court during the enquiry into, or trial of, any particular case," and confers upon judges the power to take steps necessary to maintain order and prevent disturbances in court. Judges are specifically empowered to forbid the introduction of weapons into courtrooms and to require searches of all those who would enter. Section 48(2) provides that "[i]n civil cases a Judge may take precautions ... by excluding undesirable persons from the Court room or building" and to make the same orders for searches and weapons bans.

Judges' discretionary powers to restrict the right to a public hearing must be exercised in conjunction with Section 19(b) of the Constitution. Justice Base is not aware of any Myanmar case-law on the relationship between the relevant legal provisions above and the Constitution, but jurisprudence from other common law jurisdictions and principles established under international law make clear the discretion of judges is strictly limited. That is, the right to a public hearing may only be restricted in exceptional circumstances for valid reasons, such as when it is strictly necessary to protect the interests of justice or the right to privacy of the parties (such as in cases involving juveniles, matrimonial disputes or the guardianship of children).³⁵ Other exceptional circumstances include when testifying witnesses may face reprisals by supporters of the accused or in professional disciplinary proceedings.³⁶ Even then, restrictions must be strictly justified and subject to ongoing assessment. The judge must explain his or her reasons for restricting access in open court.³⁷

Myanmar law also establishes a limited number of specific restrictions to the right to a public hearing. Section 42(b) of the Child Law 1993 excludes public access to cases in which persons aged 16 or younger are tried, other than by special permission. Section 14 of the Burma Official Secrets Act 1923 creates another exception, permitting courts to exclude the public from proceedings brought under the Act upon the prosecution's request.³⁸

The 2014 Myanmar News Media Law prevents pre-publication censorship and, among other things, gives media the right to freely criticise the judiciary.³⁹ But while a Media Access Handbook published by the Supreme Court permits journalists to report on court proceedings, it instructs media to seek permission from the Chief Judge of a Court before entering a courtroom.⁴⁰

In conversations with Justice Base, the Office of the Supreme Court stressed that access is limited to protect the private interests of individuals and courts only

require permission when journalists wish to interview particular persons inside. The Office of the Supreme Court also reasoned that the press may publish information prejudicial to ongoing proceedings and courts limit access only in response to these narrow concerns.

While Justice Base agrees these concerns are important, the Media Access Handbook remains unclear as to exactly when and for what reasons permission is required. Requiring permission to enter a courtroom in every instance is inconsistent with Myanmar's 2008 Constitution and other domestic law.⁴¹ The Chief Judge of a court should only restrict media access when it is strictly necessary, such as in a juvenile case, and when doing so, should provide reasons in open court.

Despite the exclusions and challenges mentioned above, the future looks more promising. Promoting the right to a public hearing, framed as public access to courts, is Strategic Action Area 1 under the OSCU's Judiciary Plan for 2015-2017, which includes plans to modernise court facilities to improve access to proceedings and provide help desks to disseminate key information to court users. Chief Justice Htun Htun Oo emphasized the right to a public hearing in statements made in February 2015, where he stated the "functions of respective courts are required to be made known to the public and the media" and "[a]ccess to information, transparency, access to justice and promotion of public awareness are all included in the strategic plan."⁴²

III. THE RIGHT TO A PUBLIC HEARING IN INTERNATIONAL INSTRUMENTS

The Universal Declaration of Human Rights ("UDHR") expresses the right to a public hearing in unconditional terms:⁴³

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

The International Covenant on Civil and Political Rights ("ICCPR") expresses the right in a qualified fashion, recognising that in certain circumstances other interests outweigh the right:⁴⁴

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the

interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

If a court wishes to derogate from the rights afforded under Article 14, the court must determine in accordance with law that the public or press should be excluded based on “*specific findings* announced in open court showing that the interest of the private lives of the parties or their families or of juveniles so requires.”⁴⁵

The Human Rights Committee has made clear the broad scope of the ICCPR right. Exceptions of the sort provided for may only be made to the extent strictly necessary in special circumstances when publicity would be prejudicial to the interests of justice. Other than in such circumstances, access must be open and not limited to a particular category of persons.⁴⁶

The ICCPR right to a public trial requires more than nominally opening hearings to the public. Courts must also make information regarding the time and venue of hearings available to the public.⁴⁷ In addition, they must provide for adequate facilities for the attendance of interested members of the public.⁴⁸

Neither the UDHR nor the ICCPR directly binds Myanmar. Although Burma, as it then was, voted in favour of the UDHR,⁴⁹ the UDHR is not legally enforceable in its own right.⁵⁰ Myanmar has not yet signed the ICCPR,⁵¹ despite repeatedly stating a commitment to consider doing so.⁵² However, the UDHR is a foundational document of international human rights law and is generally regarded as having reached the status of customary international law through widespread state practice and *opinio juris* (the belief of states that they are so legally bound).⁵³ States are arguably bound to respect and fulfill the rights articulated in the UDHR, including the right to a fair and public hearing. Similarly, many agree that the right to a fair trial as articulated in the ICCPR is widely accepted as common practice.⁵⁴ At least in the context of criminal proceedings, states are bound to abide by the rule that every person has the right to a public hearing in a court of first instance.⁵⁵

IV. CASE STUDY: PUBLIC ACCESS TO COURTS IN THE UNITED KINGDOM

The United Kingdom, a fellow common law jurisdiction and the drafter of Myanmar’s original Penal and Criminal Procedure Codes, affords citizens public access to court hearings. Under Article 6 of the European Convention on Human Rights (“ECHR”) citizens possess the right to a fair trial, including the right to a “fair and public hearing within a reasonable time by an independent and impartial tribunal.” In addition, the public:

[M]ay be excluded from all or part of the trial in the interests of morals, public order or national security . . . where the interests of juveniles or the protection of the private life of the parties so require, or to the extent *strictly necessary* in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.⁵⁶

In interpreting the general right to court access under Article 6 of the ECHR, the European Court of Human Rights has stated that while it may be subject to

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limitations, such limitations must not “restrict or reduce the access” in such a way that the “very essence of the right is impaired.”⁵⁷ In addition, a limitation is incompatible with Article 6 if it does not pursue a “legitimate aim” and if there is not a “reasonable relationship of proportionality between the means employed and the aim.”⁵⁸

The Human Rights Act 1998 incorporated the rights set out in the ECHR into domestic UK law and tracks the ECHR’s language, providing for the same exceptions to the right to a public hearing, including when it is in the interest of national security or when it is necessary to protect the privacy of litigants.

PUBLIC ACCESS TO PROCEEDINGS IN YANGON REGION'S COURTS

I. METHODOLOGY

Justice Base recruited four Myanmar nationals (non-lawyers) to act as observers for this project. The observers – three male and one female, aged from their mid-twenties to their early thirties – received basic training in domestic and international law on the right to a public hearing. Justice Base also trained them as to how to proceed if and when obstacles to courtroom access arose. Inevitably, observers responded to situations differently; in particular, when officials engaged in intimidating behavior to dissuade observers from entering courtrooms.

The instructions observers followed included a code of conduct and a script if courtroom or courthouse actors questioned them as to why they were present: observers were to reply that they were exercising their right as ordinary citizens to observe.⁵⁹ If questioned further, they were to provide the business card of Justice Base's Country Director and refer all inquiries to the organisation.⁶⁰ In practice, however, observers proved reluctant to disclose their affiliation with Justice Base when faced with questioning, for two reasons. First, observers often felt that revealing their affiliation with the organisation could lead to trouble for them personally. Second, there was concern that revealing the project to court officials could change court officials' behaviour and lead them to treat observers differently than if they were normal citizens attempting to observe proceedings. Despite observers' reluctance to disclose their association with Justice Base, it is possible lawyers and/or court officials around Yangon became aware of observations by the latter stages of the project. If this was the case, it is unclear how it affected the behaviour of lawyers and officials.

After an initial pilot period, observers spent four weeks working in pairs to attempt to observe proceedings around Yangon. Justice Base gave each pair a list of 25 of the 50 courts in Yangon (45 Township Courts, 4 District Courts and the Yangon High Court). A pair would attempt to enter the given courthouse – arriving separately to minimise the chance of arousing any suspicion – and, once inside, attempt to observe proceedings in separate courtrooms. If successful in gaining entry, an observer would stay in any given courtroom for a maximum of two hearings or two hours before moving to the next room. When the pair observed all functioning courtrooms, they would move to the next courthouse and repeat the process. Observers used a questionnaire developed by Justice Base to systematically collect information as they went: such as whether there were any barriers to entering the courthouse premises, whether there were barriers to entering courtrooms, whether other members of the public were observing proceedings from inside or outside courtrooms, and whether they were challenged by officials once inside a courtroom.⁶¹ The nature of cases observed depended purely on chance: there was, for instance, no attempt to either target or avoid politically sensitive cases.

Halfway through the observation period it became apparent that the presence of observers in a courthouse for more than a few hours usually aroused suspicions. Justice Base determined it must minimise the total amount of time any one

observer spent in a given courthouse to mitigate risk to the observers and the project. Accordingly, Justice Base decided all four observers would conduct observations in different courtrooms at the same courthouse at the same time rather than attending courthouses in pairs. Observers could then complete the required number of observations for each courthouse more quickly and observers could move on before their presence aroused suspicion.⁶²

Justice Base also consulted with Myanmar lawyers, government officials and non-governmental organisations working on justice sector reform. Justice Base met with the Office of the Supreme Court, which provided comments on a final draft of this report.

In total, observers visited 36 of Yangon's courthouses (31 Township Courts, four District Courts, and the High Court) and observed a total of 205 hearings across approximately 119 courtrooms for an average of around 26 minutes per hearing.⁶³ Observers attended both civil and criminal hearings. Observers saw all stages of proceedings, including oral arguments, examinations in chief and cross-examinations, the delivery of verdicts, and sentencing. Observations took place only within the Yangon municipality.

The data gathered are discussed thematically below.

II. ACCESS TO YANGON'S COURTHOUSE PREMISES

As noted above, observers visited a total of 36 courthouses across Yangon. Observers encountered protocols or obstacles in one form or another in accessing courthouse premises approximately 16% of the time.

In two District Courts, officials required observers to present their identification cards and leave them with officials in order to enter the premises. Numerous Township Courts required similar information, including not only identification cards but addresses and the names of observers' fathers. In some cases, officials asked for such information only after it became clear the observer did not have a personal connection to a particular hearing inside. In one instance, officials also administered a physical security check.

Gatekeeping officials frequently quizzed observers as to their reasons for entry. On one such occasion, when an observer said he simply wished to observe proceedings as an ordinary citizen, the official told him he would need to speak to and obtain permission from the Chief Judge. Lacking what would be considered a good reason, and reluctant to explain his affiliation with Justice Base for reasons discussed above,⁶⁴ the observer decided to leave.

At a second courthouse, a sign at the entrance to the courthouse indicated that no one could enter except on duty or official business. A clerk asked what the observers were doing when they sought to enter the premises and brought a judge to come and meet with them. The judge asked what they were doing, and eventually allowed them to stay when they insisted they were ordinary citizens who wanted to observe what went on in the courts.

At two of the courthouses visited, being connected to a case was not just an expectation but a rigid requirement of entry. At one Township Court, entry was contingent on the issuance of an entrance card. Court officials issued this card

only after observers provided their names, addresses, identification card numbers, their reason for entering the courthouse, and the name of the person they were going to see inside. The observers managed to gain entry, but only after inventing reasons, such as that they were there to see a friend who was a witness in a case.⁶⁵ It was clear officials would not allow observers on the premises in the absence of such a reason.

The Yangon High Court imposed the same rigid requirement for entry. One of the two observers who was refused entry described his experience as follows:

At the gate of the High Court, an official stopped me and asked me "What is the matter?" When I replied [that I wanted to enter to watch a hearing], the official said "Wait a moment" and called the security guard. The guard asked me "How are you related [to the proceedings]?" I replied "I am observing the court proceedings as an ordinary citizen." He asked "To which hearing are you related?" I replied "[I am] not related to any hearing. I am just an ordinary citizen who would like to observe." And I asked him "Is there any hearing in this court?" He answered "Sure there is." I said "I would like to enter as an ordinary citizen to observe the hearings." The guard said ... "No, since you are not related to any case or hearing, you are not allowed to enter into the Courthouse."

III. ACCESS TO YANGON'S COURTROOMS

Observers found that gaining entry into a courtroom and remaining in that courtroom for the duration of a hearing were often different matters.

a. Obstacles to gaining entry to courtrooms, such as requiring the provision of identifying information, obtaining permission from presiding judges and direct refusal

As noted above, observers were able to enter courtrooms about 50% of the time without impediment. Observers were unable to enter, or could only enter after being challenged, the remaining courtrooms.

Similar to obstacles faced at courthouse gates, court officials permitted entry to numerous courtrooms only after observers provided identifying details to the clerk, such as their names, addresses, and fathers' names. In one courtroom, the observer had to provide his name and address, plus the name of his former school, qualifications and occupation to the presiding judge as he entered.

Two courtrooms had signs reading "No entrance without permission" or "Seek permission before entry" posted outside. At other courtrooms, officials required observers to seek permission of the presiding judge in order to enter and observe proceedings. The requirement of asking permission arose at a separate courtroom only when it became apparent to the law officer (prosecutor) that the observer had no personal connection to the proceedings.

On several occasions, judicial officers – including judges and clerks – interrupted proceedings to challenge observers as to what they were doing as they entered

the courtroom. The observers followed the script, saying they wanted to observe proceedings, and were subsequently allowed to enter.

Officials also refused observers entry to some courtrooms. On three occasions, police officers positioned near an open court door moved to block observers' attempts to enter. On one of these occasions, a judge who heard the obstructed observer's raised voice told the police to let the observer enter.

Another refusal occurred when an observer attempted to enter a courtroom during the examination of a witness in a well-known politically related trial.⁶⁶ An unidentified person (that is, someone who was not a uniformed police officer) told him not to enter. When the observer asked why not, the unidentified person told the observer – in a manner the observer described as intimidating – he should not enter because his presence would present an obstacle to the hearing.

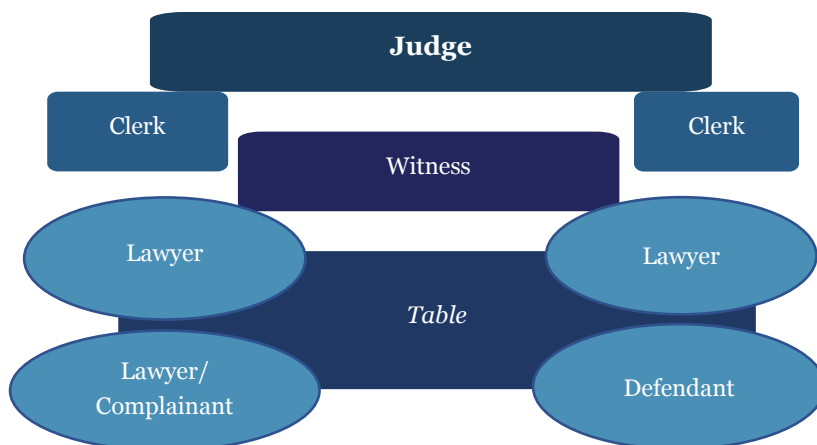
Finally, an observer was refused entry on a separate occasion by a clerk, who told him there was a risk he could be confused with the defendant and witnesses if he entered, although after the hearing the judge told the observer the real reason he was not permitted to enter was because the courtroom was too small to accommodate him.

b. Logistical obstacles to entry, such as a lack of space and seating

Approximately two-thirds of all courtrooms observed did not have seats for the public. In more than 40 of those, observers could not comfortably stand in the room to watch proceedings, meaning they had to attempt to listen from the door or corridor. Observers estimated the size of each room they entered, and at the Township Courts, the average estimate was 4.6 by 4.6 metres. On a number of occasions, public seating benches were in corridors outside courtrooms when it appeared they could have fit inside comfortably. Sometimes spare spaces inside courtrooms were used for purposes other than seating, such as to store water coolers.

There were on average around eight people present in a courtroom during the hearings observed. Typically, this included the parties to proceedings, lawyers, officials (judge, clerk, and police) and/or witnesses.

Diagram 2: A typical courtroom



Members of the public (that is, family members or anyone else who was not a party to proceedings, court officials, lawyers or witnesses) were rarely present in the courtroom. When officials did not permit entry to the courtroom, observers were usually able to hear proceedings from the corridor. This was the most common place for family members or other members of the public to be during a hearing: observers identified such people listening or waiting in the corridor during more than a third of hearings observed.

In addition to space constraints, facilities such as public toilets were infrequently available. When they were, members of the public usually had to either pay a fee to access them or obtain keys from judges and clerks as most bathrooms were locked. Observers located cause lists – documents displayed to publicise times and locations of hearings –and confirmed their accuracy for only around 60% of all courtrooms visited.

The right to a public hearing, realised properly, requires that courts make information regarding the time and venue of hearings available to the public and provide adequate facilities for the attendance of interested members of the public.⁶⁷ Observers reported the way in which officials managed courthouses in Yangon, including the lack of facilities and information, often contributed to the sense that courtrooms were not places where the public was welcome.

c. Challenges to remaining in courtrooms once entry had been attained

In total, observers were able to enter about half of the courtrooms they attempted to access. Observers watched proceedings and left without incident in approximately 50% of those courtrooms. They reported facing some sort of challenge or scrutiny in the remaining half (approximately 30 courtrooms).

Observers were challenged as to who they were and what they were doing by judges, clerks, law officers or lawyers, complainants, and police officers inside courtrooms. On most occasions, observers were able to satisfy the challenging party that they were simply exercising their right to observe proceedings and officials should allow them to remain. In two courtrooms, they had to provide their identifying details.

However, even when observers were permitted to remain in the courtroom, other actions made observers feel uncomfortable: sometimes judges or law officers would look at observers during hearings to the extent that observers felt discomfort, and one observer reported an instance of a judge aiming a camera at him.

d. Examples of the most serious challenges and removal from courtrooms

On two occasions, court officials required observers to speak with the Chief Judge at the end of a hearing to explain what they had been doing and why they had come to observe the hearing; one of those conversations occurred in chambers. On a third occasion, the presiding judge requested the same information but also asked the observer whether he was there to check up on what he (the judge) was doing. That same judge later approached the observer after the hearing. He asked the observer what he had seen during his observation,

and subsequent events led the observer to believe the judge reported his presence to police in the courthouse.

On a separate occasion, a law officer who challenged the observer asked, among other questions, where the observer was from. When it was apparent the observer was not from the part of Yangon where this particular courthouse was situated, the law officer quizzed the observer as to why he would go to a courthouse in another area. The law officer asked a police officer to take the observer outside to make inquiries. The police officer did so and questioned the observer at some length about what he was doing, who he was working for, and so on.⁶⁸

In a different courtroom, a police officer physically removed an observer. The police officer had asked the observer whether he was connected to any of the witnesses. The observer replied in the negative, and then, in the observer's words:

The policeman asked "Then what are you doing here?" I answered "I am coming to observe the court proceedings as an interested ordinary citizen." The policeman said "Then go outside and watch there." I said "Why? I want to observe as an ordinary citizen." He replied "No. You can't. Go outside and watch outside." I looked to the Judge and the Judge did not say anything. Then, the policeman took me from my arm and dragged me outside.

On another occasion, a law officer declared those who were not related to the trial were not allowed to sit inside, and went outside to call for a police officer to come into the courtroom and search the observer. The police officer declined to do so, but sat down next to the observer and remained there as the hearing resumed. At the conclusion of the hearing, the police officer took the observer by the arm and led him out of the courtroom. The law officer joined and, together with the police officer, spent around half an hour asking the observer questions. These included where the observer lived, why he was in that part of town, why he wanted to watch what happened in court, who he was reporting to and what organisation he was from. The police officer eventually told the law officer the observer could stay in the courthouse, but made the observer first give him his name and mobile number. Later that day, and then once again a few days later, the police officer called the observer to ask what he was doing and whether he had watched other court proceedings.

CONCLUSIONS AND RECOMMENDATIONS

What to make of the results of this research project might depend on one's expectations of Myanmar's courts. Given the history of closed courts, it is perhaps encouraging that observers only encountered barriers to premises at one-third of the courthouses they visited, and the common barriers to entry (supplying personal details and/or undergoing a security check) could be easily overcome. However, observers were only able to enter, observe and remain inside courtrooms without further questioning in approximately one quarter of all courtrooms. On many occasions, observers faced some sort of informal challenge, such as the need to establish a personal connection to a case or otherwise justify his or her presence. The power to exclude the public from a hearing under Myanmar law is supposed to turn on the nature of the hearing (such as in a juvenile case) or genuine security concerns, rather than on whether the person who wishes to observe can prove that he or she has a personal connection to the case. The right to an open court is meant to ensure that the public in general, rather than a specific category of persons (such as family members of the parties), can observe proceedings.⁶⁹

In debriefings with Justice Base, observers reported feeling uneasy that, because cases move slowly through the system, police officers and court officials easily identify new attendees. Though the lack of a personal connection did not frequently lead to enforced exclusion, judges and other official actors often subjected observers to intimidating behavior (having to give their details to judges and clerks, being required to meet with judges in chambers to ask permission, justifying their presence, and being questioned by police).⁷⁰ The extent to which such behaviour is likely to intimidate members of the public and deter them from going near the courts should not be underestimated, given that judges and other officials are widely perceived to be corrupt, and given also that there is a very recent history of extensive government surveillance and suppression of fundamental rights and freedoms in Myanmar.⁷¹

When Justice Base asked observers directly whether their friends or family would feel comfortable observing proceedings, all four were of the view that the public generally do not see courts as places in which their presence is welcome. One talked about the lack of trust in the judicial process and how judges are frequently rude and tough on complainants. A second observer recounted how his friends and family would be too afraid to enter. Another added she did not know the public could access court hearings prior to this project and doubted others were aware. One observer said people felt uncomfortable with the questions they were asked when they went to court, including those about their identity and reason for attending court hearings.

Lawyers and non-governmental organisation workers interviewed for the project stated that courts in Myanmar have opened significantly in the past decade. But further positive change should not be taken as a given. Considering the legal reforms that have occurred since 2011, legal scholar Nick Cheesman says:⁷²

In a short time, a lot changed in Myanmar. But experience shows that ideas and practices – once habituated and institutionalized through courts, prosecutorial agencies, and police forces – can prove highly resilient. Around Asia, people still feel the effects

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of repressive government years after the end of dictatorship. Filipino policemen still torture. Indonesian judges still take bribes. Tectonic shifts in political power can be dramatic and exciting, but shifts in institutional behaviour are protracted and wearisome.

The same commentator, when discussing the use of closed courts in political cases in recent years, describes how in comparison to the special courts of the past, “[t]he juridical space for closed courts is [now] located in the ordinary law”⁷³ – specifically, in the laws set out above that confer discretion to close the court.⁷⁴ It is noteworthy that, in the experience of the observers employed by this project, officials did not make a single attempt to legitimise their actions (such as excluding observers, questioning them, making them seek permission, and so on) by reference to law. Officials primarily justified their actions by reference to the view those without a personal connection had no place in the court, rather than by reference to law or security concerns.

To restore the legitimacy of and public trust in Myanmar’s legal system, issues around public access to the courts ought to be addressed alongside more well-documented problems of corruption, executive influence and inadequate training.

In comments to Justice Base, the Office of the Supreme Court has made clear its desire to support access to courts and improve facilities to encourage public hearings. The Office of the Supreme Court, in cooperation with USAID’s Promoting the Rule of Law Project, implemented a number of systemic changes in pilot courts across Myanmar, including: case management systems to resolve disputes quickly, customer service trainings for judges and court officials, and information counters to assist court users in navigating the court system. In addition, the Office of the Supreme Court stated that such courts include waiting rooms, freely available public toilets and clean drinking water. Justice Base welcomes these improvements and acknowledges the difficulties involved in judicial reform, such as budget constraints and lack of adequately trained staff. The recommendations below offer a number of important reforms that should be implemented by the Myanmar government, some of which could be implemented quickly at minimal expense.

FOR THESE REASONS, JUSTICE BASE RECOMMENDS:

A Judges and court officials change their practices to ensure compliance with Myanmar law and international law concerning the right to a public hearing. Specifically, Justice Base recommends:

- (i) Judges should, in accordance with Section 19(b) of the 2008 Constitution and Section 3(b) of the Union Judiciary Law 2010, administer courts on the basis that courtrooms, courthouse buildings and court premises are open to the public. The right to a public hearing and access to either a courtroom or the courthouse generally should only be restricted in exceptional circumstances, such as when it is strictly necessary to protect the interests of justice or when a security threat exists. Judges should explain their reasons for restricting the right to a public hearing in open court and explain which provision of Myanmar law they are relying on to exclude the public. Judges should carry this out in accordance with

guidance or a directive issued by the Chief Justice (see recommendation B(i)).

- (ii) In accordance with Section 352 of the Code of Criminal Procedure and Sections 48(1) and (2) of the Courts Manual, only presiding judges or magistrates may restrict the right to enter and remain in either a courtroom, the courthouse or the premises and, even then, restrictions must be strictly justified and subject to ongoing assessment. Police officers, clerks, lawyers, and parties to proceedings and other gatekeeping officials have no legal authority to make the decision to close courts and judges should not let them purport to do so.
- (iii) Judges, clerks and other officials should permit any person to enter the courtroom and attend the hearing without any questioning of the individual except where a limited, valid reason exists to exclude the public from the hearing in accordance with Myanmar law.
- (iv) Judges and other court officials should discontinue the practices of acting as if members of the public can only (or should only) observe a hearing if they have a personal connection to a particular hearing and requiring permission of a judge to enter a courtroom. Judges and other court officials should refrain from requiring members of the public to provide identification cards or other identifying information before entering a courthouse or courtroom or at least strictly limit such practices. Courts should also remove any signs suggesting that such permission is required.
- (v) Court officials should take steps to improve public access to courtrooms, including by taking measures such as providing seating whenever courtroom space permits, making bathrooms and other facilities freely available to the public, and ensuring that up to date and accurate cause lists are made publicly available in courthouses. Leaflets, posters and simple illustrations depicting the public's right to court access should be readily available at information counters inside each courthouse. Court officials should also prioritise the use of bigger courtrooms where possible and, if and when new courthouses are constructed, ensure courtrooms have adequate space and seating for the public.

B The Chief Justice and the Office of the Supreme Court should ensure compliance with Myanmar law and international law concerning the right to a public hearing. Specifically, Justice Base recommends:

- (i) The Chief Justice should issue a public directive to all courts detailing the law and how it works in practice. This should include detailed guidance on the specific circumstances in which a judge can exclude the public from a hearing under Myanmar law.
- (ii) The Office of the Supreme Court should amend the Media Access Handbook to make clear the media is not required to seek permission from the Chief Judge of a Court before entering a courtroom in accordance with Myanmar law.

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- (iii) The Office of the Supreme Court should take steps to support the above recommendations in court practice, including through education of judges and other court officials, sanctioning those who fail to comply with the law, and developing strategies for improving public access to and perceptions of the courts in its yearly Action Plans.

REFERENCES

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- ¹ “Myanmar’s General Election: A New Era” (12 November 2015), The Economist <www.economist.com>.
- ² Nick Cheesman, “Opposing the Rule of Law: How Myanmar’s Courts Make Law and Order” (Cambridge University Press, United Kingdom, 2015) at 117-118.
- ³ While this data derived from observers’ questionnaires and subsequent conversations with Justice Base staff to validate findings, it is possible that observers understated such obstacles, either by failing to adhere to the methodology and using a variety of reasons to enter the premises or by not attempting to enter due to fear.
- ⁴ Constitution of the Republic of the Union of Myanmar (2008) (“2008 Constitution”), ch VI.
- ⁵ Section 316. The Constitution also creates the possibility of courts lower than Township Courts as “constituted by law.” Section 293(a).
- ⁶ As do the equivalent Courts of Self-Administered Zones: 2008 Constitution, Section 315; Union Judiciary Law 2010, Sections 53–55.
- ⁷ 2008 Constitution, Section 314. High Courts also have some original jurisdiction: *see* Section 306.
- ⁸ Sections 294 and 295.
- ⁹ Section 319.
- ¹⁰ Section 322.
- ¹¹ *See* Judiciary Law (2010) and Union Supreme Court website: <http://www.unionsupremecourt.gov.mm/>
- ¹² *See* for instance ch 1, Sections 11(a) and 19(a).
- ¹³ Yanghee Lee, “Report of the Special Rapporteur on the situation of human rights in Myanmar” (18 March 2016) A/HRC/31/71 at para 15.
- ¹⁴ International Commission of Jurists, “Re: Implementable Action Plans from the ICJ to the new Parliament & Government” (3 May 2016) <<https://www.icj.org/wp-content/uploads/2016/06/Myanmar-Recommendation-to-NLD-Gvt-Advocacy-Analysis-Brief-2016-ENG.pdf>> at 5-6. *See also* International Commission of Jurists, “Myanmar: Country Profile prepared by the ICJ Centre for the Independence of Judges and Lawyers” (2014) <<https://www.icj.org/wp-content/uploads/2014/06/CIJL-Country-Profile-Myanmar-June-2014.pdf>>.
- ¹⁵ Myint Zan, “Judicial Independence in Burma: No March Backwards Towards the Past,” 1 Asian-Pacific Law & Policy Journal 5 (2000), at 13.
- ¹⁶ *Id.* at 25.
- ¹⁷ Nick Cheesman “Thin Rule of Law or Un-Rule of Law in Myanmar?” (2010) 82(4) Pacific Affairs 597 at 612.
- ¹⁸ Cheesman, above n 2, at 161–162.
- ¹⁹ International Commission of Jurists “Myanmar: Country Profile prepared by the ICJ Centre for the Independence of Judges and Lawyers,” above n 14, at 11. *See also* Khaing Sape Saw, “Tackling Myanmar’s Corruption Challenge” (April 2015) 13 Focus Asia: Perspectives and Analysis 1.
- ²⁰ Lee, above n 13, at 15; International Bar Association’s Human Rights Initiative, “The Rule of Law in Myanmar: Challenges and Prospects” (International Bar Association, London, December 2012).
- ²¹ *See* International Commission of Jurists, “Right to Counsel: The Independence of Lawyers in Myanmar” (2013) <www.icj.org> at 31; DLA Piper New Perimeter, “Myanmar Rule of Law Assessment” (March 2013), <www.newperimeter.com> at 36.
- ²² *See* International Commission of Jurists, “Right to Counsel: The Independence of Lawyers in Myanmar,” above n 21; Melissa Crouch “Rediscovering ‘Law’ in Myanmar” (2014) 23 Pac Rim L & Pol’y J 543 at 545-46.
- ²³ Lee, above n 13.
- ²⁴ *See* Sections 301(d) (iv), 310(d) (iii), and 333(d)(iv) of the 2008 Constitution, which provide that a person without experience as a judge or practicing lawyer may be appointed to the bench of the higher courts if the President considers them to be an “eminent jurist.”
- ²⁵ The distinction between substantive law reform and advocacy for formal legality in the context of “cause lawyering” in Myanmar is drawn in Nick Cheesman and Kyaw Min San, “Not Just Defending: Advocating for Law in Myanmar” (2014) 31 Wis. Int’l L J 702 at 704–705.
- ²⁶ *See* for instance, the All Burma Federation of Student Unions’ boycott of the “failed” court system: “Students to boycott failed judicial system” (15 March 2016), Asian Human Rights Commission Press Release AHRC-STM 033-2016 <<http://www.ahrchk.org/ruleoflawasia.net/news.php?id=AHRC-STM-033-2016>>. *See also* International Commission of Jurists, above n 20, at 14-15; Justice Base, “Voices from the Intersection: Women’s Access to Justice in the Plural Legal System of Myanmar” (2016)

<www.justicebase.org> at 9, 54 and 81. This problem is recognised by Myanmar's government: *see* "Moving Forward to the Rule of Law: Strategic Plan 2015–2019" (Union Attorney General's Office, Nay Pyi Taw, 2015) at 11.

²⁷ Jeremy Lever, "Why Procedure is More Important than Substantive Law" 48 *Int'l & Comp LQ* 285 (1999) at 300, discussing Tom Tyler, *Who Do People Obey the Law* (Yale University Press, New Haven, 1990).

²⁸ Ola Johan Settem, "Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings," (Springer, New York, 2016) at 120. *See also* Human Rights Committee *General Comment No. 32*, CCPR/C/GC/32 (23 August 2007) at [28].

²⁹ M Cherif Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions" (1992–1993) 3 *Duke J Comp Int'l L* 235 at 274.

³⁰ *See* the framing of the right to a public hearing as part of a broader fair trial right in the international instruments discussed in Section 2, subpart III below.

³¹ Bassiouni, above n 29, at 274.

³² Sarosh Zaiwalla, "Secret courts: justice conducted behind closed doors is no justice at all" (19 August 2013), *The Guardian* <www.theguardian.com>.

³³ Tom Bingham, "The Rule of Law" (Penguin, London, 2011) at 96-97.

³⁴ The slogan "democracies die behind closed doors," employed in the recent debate about secret terrorist trials in the United Kingdom, originated in a decision of the United States Court of Appeals for the Sixth Circuit: *see Detroit Free Press v Ashcroft* 03 F3d 681 (6th Cir 2002) per Keith J.

³⁵ *See* Human Rights Committee, n 28, at [29]; UN Commission on Human Rights, "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights," E/CN.4/1985/4, (28 September 1984), para 38(a).

³⁶ Stefan Trechsel, "The Significance of International Human Rights for Criminal Procedure" (2011) 6 *Nat'l Taiwan Univ. Law Rev.* 1 at 191 (witness reprisal); Mole, Nuala and Harby, "The Right to a Fair Trial: A guide to the implementation of Article 6 of the European Convention on Human Rights" (2006) at 22.

³⁷ UN Commission on Human Rights, "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights," above n 35.

³⁸ Section 14 applies to any offence under the Act. The Act criminalizes a number of actions concerning prohibited places, defined largely as any work of any arm of the military, any place used for the purpose of the State and any railway or channel or other communication by land or water, including approaching it or making any model or note of it that may be useful to an enemy.

³⁹ Myanmar News Media Law 2014, Sections 4(a) and 5.

⁴⁰ "Handbook for Media Access to the Courts" (October 2015), The Supreme Court of the Union <www.unionsupremecourt.gov.mm> at 20. Indeed, Myanmar observers reported the existence of posters inside court buildings telling members of the media to seek such permission. The Handbook also instructs media that when reporting on cases they must, among other matters, "avoid the acts that can belittle the judicial authority of the court; ... [and] that can have negative impact on the public trust in the judiciary": *see* at para 7, 16. Journalists are also prohibited from conducting interviews with parties to proceedings and are told not to ask questions (presumably of any other commentator) about the merits of a case: *see* at 20–21.

⁴¹ The Media Access Handbook is also inconsistent with international law. *See* Human Rights Committee, n 28, at [29] ("Apart from [] exceptional circumstances, a hearing must be open to the general public, including members of the media. . .").

⁴² Eleven, "Judicial process must be independent and transparent, says chief justice" (9 February 2015) <<http://www.elevenmyanmar.com/local/judicial-process-must-be-independent-and-transparent-says-chief-justice>>

⁴³ Universal Declaration of Human Rights, GA Res 217A (III), (10 December 1948.), art 10.

⁴⁴ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14.

⁴⁵ UN Commission on Human Rights, "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights," above n 35.

⁴⁶ Human Rights Committee, above n 28, at [29].

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See* "Yearbook of the United Nations 1948–1949" The Yearbook of the United Nations <unyearbook.un.org> at 535.

⁵⁰ Malcolm N Shaw, *International Law* (7th ed., Cambridge University Press, Cambridge, 2014) at 279.

⁵¹ *See* United Nations Human Rights Office of the High Commissioner, "Status of Ratification"

<<http://indicators.ohchr.org/>>.

⁵² “Report of the Working Group on the Universal Periodic Review: Myanmar,” A/HRC/31/13 (23 December 2015) at [143.4], reaffirming the commitment expressed during the previous Universal Periodic Review: “Report of the Working Group on the Universal Periodic Review: Myanmar,” A/HRC/17/9 (24 March 2011) at [104.6]. Myanmar also accepted a recommendation to consider judicial reforms – though the recommendation did not specifically relate to public access to courts: *see* A/HRC/31/13 (23 December 2015) at [143.48].

⁵³ “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.” Restat. 3d of the Foreign Relations Law of the U.S. (1987) at § 102(2) and (3).

⁵⁴ Patrick Robinson, “The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY” (2009) 3 Berk J Intl L Publicist 1, at 5. *See also* Yvonne McDermott, “The Right to a Fair Trial in International Criminal Law” (PhD thesis, National University of Ireland Galway, July 2013) at 17; and in a related context, *see* “Customary International Humanitarian Law Database,” International Committee of the Red Cross <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100>, at Rule 100.

⁵⁵ International Commission of Jurists, “Trial Observation Manual for Criminal Proceedings” (22 July 2009) <<https://www.icj.org/criminal-trials-and-human-rights-a-manual-on-trial-observation/>> at 84.

⁵⁶ UK Human Rights Act 1998, Schedule I, Article 6(1) (emphasis added).

⁵⁷ *Philis v. Greece*, Application No. 12750/87; 13780/88; 14003/88 (27 August 1991), at §59.

⁵⁸ *Ashingdane v. the United Kingdom*, Application No. 8225/78 (28 May 1985), at §57.

⁵⁹ The code of conduct is reproduced in Appendix A. Names have been removed to protect the confidentiality of all participants.

⁶⁰ In practice, observers did not feel comfortable taking this final step as they felt it would exacerbate difficulties with officials: *see* below at n 68.

⁶¹ The questionnaire is reproduced in Appendix B.

⁶² In the last three days of the observation period another change was made to enable the collection of more data about courthouse access: on these days, observers would observe one courtroom at a given courthouse (rather than all courtrooms between the pair of observers) before moving to the next courthouse.

⁶³ On some occasions both members of a pair observed proceedings in the same courtroom at different times, so the number of unique courtrooms may be less.

⁶⁴ *See* above at Section 3, Part I.

⁶⁵ This was a breach of protocol on the part of the observers. Justice Base had instructed observers to respond honestly when asked questions by officials and to simply leave if they could not gain entrance as ordinary citizens with no special interest in proceedings.

⁶⁶ The trial related to the 2015 machete attack on a National League for Democracy politician: *see* Antoni Slodkowski and Soe Zeya Tun, “Myanmar opposition candidate attacked with machetes,” (29 October 2015), Reuters <<http://www.reuters.com/article/us-myanmar-election-violence-idUSKCN0SN2GU2015102>>

⁶⁷ *See* Human Rights Committee, above n 28, at [28].

⁶⁸ The observer in this instance failed to follow protocol and provide Justice Base’s details for the reasons discussed above at Section 3, Part I.

⁶⁹ *See* Human Rights Committee, above n 28, at [29] (“Apart from ... exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons”) (emphasis added).

⁷⁰ In a summary debrief to Justice Base, one observer reported that at times, his level of discomfort resulted in his calling Justice Base staff to explain his unease and resulted in his moving to a different courthouse or courtroom sooner than otherwise planned.

⁷¹ Christina Fink, *Living Silence in Burma* (2nd ed, Zed Books, London, 2009) at 134, as cited in Fortify Rights, “Midnight Intrusion: Ending Guest Registration and Household Inspections in Myanmar” (March 2015) Fortify Rights <www.fortifyrights.org> at 12.

⁷² Cheesman, above n 2, at 101.

⁷³ *Id.* at 117.

⁷⁴ *See* Section 2, Part I above.

APPENDIX A

Observer Code of Conduct

This document sets out the basic standards of conduct expected of observers for Justice Base's Access to Courts Project (herein "Project") for the duration of the contractual period.

1. Professionalism

Observers shall:

- Treat all Justice Base staff, including other observers, with dignity and respect.
- Be familiar with all Project guidelines and training materials and be diligent with responsibilities.
- Attend all Project-related trainings and meetings.
- Arrive promptly to all Project-related events.
- Strictly obey the court rules.
- Pay full attention to the proceedings and take detailed and complete notes during observation.
- Dress in a dignified and appropriate manner, particularly when attending court proceedings.
- Be available by phone and respond promptly to Project-related communications.
- Coordinate closely with the assigned partner observer and Justice Base.

2. Nonintervention

Observers shall **not**:

- Influence a proceeding in any way.
- Ask a lawyer or other court official their opinion on a case or advise them with regard to a course of legal action to take.

3. Objectivity and impartiality

Observers shall **not**:

- At any time express bias in favor of any party to a case.
- Make any statement to court officials, parties to a case or any other third party, including the media, on the proceedings.

Observers shall:

- Avoid the appearance of bias; this includes choice of seating area.

4. Confidentiality

Observers shall:

- Ensure the safety and confidentiality of hand-written notes, data handled electronically and of other collected information.

5. Providing information to court officials

Observers shall:

- Upon questioning, explain that he or she is in the courtroom to observe a hearing as a member of the public.
- If necessary, state there is a constitutional right to an open court in Myanmar.
- Provide, when necessary, the business card of Justice Base's Myanmar Country Director to court officials.
- Remain in the courtroom for two hearings unless you are asked (or forced) to leave.

Observers shall **not**:

- Provide additional detail regarding the Access to Courts Project or refer to other staff members to any members of the court during the contractual period.

6. Security

Observers shall:

- Calmly ask for an explanation only once if refused entry, asked or forced to leave during a courtroom hearing.
- Comply with the requests of court officials.
- Keep the assigned partner observer up-to-date on any security concerns.
- Discontinue Project-related activities immediately if any participating parties feel unsafe at any point, for whatever reason.
- Report security-related incidents or serious concerns immediately to Justice Base.

I, _____ acknowledge having received a copy of the Code of Conduct, understand and accept all the provisions thereof, and undertake to perform my duties in accordance with them. Should I have any doubts or questions regarding this document, I will report them immediately to the supervising party, Justice Base.

Signature _____

Date _____

APPENDIX B

Questionnaire

Section A: Overview

Note: Section A only needs to be filled out once per visit to a courthouse. For instance, if an observer observes hearings in three different courtrooms within one courthouse, Section B will need to be completed three times, but Section A only once.

1	Observer name	
2	Date of observation	
3	Court	<p><u>Township Courts</u></p> <p> <input type="checkbox"/> 1. Sanchaung <input type="checkbox"/> 2. Insein <input type="checkbox"/> 3. Tamwe <input type="checkbox"/> 4. Hlaing <input type="checkbox"/> 5. Dawbon <input type="checkbox"/> 6. Botataung <input type="checkbox"/> 7. Dagon Seikkan <input type="checkbox"/> 8. Hlaingthaya <input type="checkbox"/> 9. Yankin <input type="checkbox"/> 10. South Okkalapa <input type="checkbox"/> 11. Mingalardon <input type="checkbox"/> 12. Thingangyun <input type="checkbox"/> 13. Shwepyitha <input type="checkbox"/> 14. Kamayut <input type="checkbox"/> 15. Mayangon <input type="checkbox"/> 16. Thaketa <input type="checkbox"/> 17. Ahlone <input type="checkbox"/> 18. Bahan <input type="checkbox"/> 19. Dagon <input type="checkbox"/> 20. Pabedan <input type="checkbox"/> 21. Pazundaung <input type="checkbox"/> 22. South Dagon <input type="checkbox"/> 23. Lanmadaw <input type="checkbox"/> 24. Kyauktada <input type="checkbox"/> 25. Kyimyindaing <input type="checkbox"/> 26. East Dagon <input type="checkbox"/> 27. Mingalartaung Nyunt <input type="checkbox"/> 28. North Dagon <input type="checkbox"/> 29. Latha <input type="checkbox"/> 30. Thanlyin <input type="checkbox"/> 31. North Okkalapa <input type="checkbox"/> 32. Dallah <input type="checkbox"/> 33. Seikkyi Kanaungto </p> <p><u>District Courts</u></p> <p> <input type="checkbox"/> 1. Western <input type="checkbox"/> 2. Eastern <input type="checkbox"/> 3. Southern <input type="checkbox"/> 4. Northern </p> <p><u>Other</u></p> <p><input type="checkbox"/> Other (if other, please name): _____</p>
4	<p>Were there any obstacles gaining entry to the courthouse, or any procedures you had to follow in order to get in?</p> <p><i>Tick all that apply</i></p>	<p><input type="checkbox"/> No, there were no problems with me gaining access</p> <p><input type="checkbox"/> Yes, there were some obstacles or procedures necessary for me to enter the courthouse building.</p> <p>If yes, please list all that apply:</p> <p> <input type="checkbox"/> ID required <input type="checkbox"/> regular security check <input type="checkbox"/> signature required <input type="checkbox"/> proof of power of attorney required <input type="checkbox"/> refused entry (if refused entry, describe below who refused you entry and any reason they gave) <input type="checkbox"/> other (if other, describe below): </p>

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5	Did the police or anyone else follow you / watch you / interact with you at all?	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, please explain what happened.
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6	How many courtrooms were there in total at the courthouse?	
7	How many of these did you observe?	
8	How many were locked / shut?	

Section B: Courtroom details

1	Courtroom number	
2	Were there any obstacles gaining entry to the courtroom, or any procedures you had to follow in order to get in?	<input type="checkbox"/> No, there were no problems with me entering the courtroom <input type="checkbox"/> Yes, there were some obstacles or procedures necessary for me to enter the courtroom If yes, please list all that apply: <input type="checkbox"/> ID required <input type="checkbox"/> regular security check <input type="checkbox"/> signature required <input type="checkbox"/> proof of power of attorney required <input type="checkbox"/> too many people inside courtroom <input type="checkbox"/> no seats available <input type="checkbox"/> door locked <input type="checkbox"/> refused entry (if refused entry, describe below who refused you entry, and any reasons they gave) <input type="checkbox"/> Other (if other, describe below):
3	If you were able to enter the courtroom, were you subsequently asked to leave at any point?	<input type="checkbox"/> No <input type="checkbox"/> Yes If yes: Who asked you to leave? What reason, if any, did they give?

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4	(same as q3)		
5	<p>If you were able to enter the courtroom, draw the courtroom layout.</p> <p>(Include, if possible, the location of the judge's bench, clerk, law officer, defendant, observers, guards, etc.)</p>		
6	What size was the courtroom?		
7	Were there chairs or other spaces for family, media or members of the public?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
8	Was a <i>cause list</i> posted in a public place?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<p>If there was a <i>cause list</i>, was it up to date?</p> <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know

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Section C: Hearing Details

Hearing 1:		
1	Give a brief description of what you observed (including the stage of proceedings if you know)	
2	If you know, what stage were the proceedings in?	<input type="checkbox"/> don't know <input type="checkbox"/> remand hearing <input type="checkbox"/> bail hearing <input type="checkbox"/> examination of the complainant <input type="checkbox"/> law officer <input type="checkbox"/> complainant's case <input type="checkbox"/> framing of the charges <input type="checkbox"/> examination of the defendant <input type="checkbox"/> defense case <input type="checkbox"/> final argument <input type="checkbox"/> verdict <input type="checkbox"/> sentencing <input type="checkbox"/> appeal <input type="checkbox"/> Other (if other, explain: _____)
3	When did you enter / attempt to enter the courtroom?	
4	When did you leave the courtroom?	
5	If you were allowed to enter the courtroom, how many people were inside and what roles (judge, policeman, lawyer, etc.) did they appear to have?	
6	Did you see anyone refused access to the hearing or be asked to leave the hearing?	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, who asked them to leave, and what reasons, if any, were provided?

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7	Were there people observing the hearing from outside the courtroom?	<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, how many?
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Section D: Other observations or comments (please be as specific as possible)